

ENGLAND AND WALES / JUDGMENT

OAJ & Ors, R (on the application of) v His Majesty's Treasury & Anor

COURT
IN THE HIGH COURT OF JUSTICE

BEFORE
MRS JUSTICE LANG DBE

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The Royal Courts of Justice

Strand

London WC2A 2LL

Thursday, 29 January 2026

IN THE HIGH COURT OF JUSTICE

KING'S BENCH DIVISION

ADMINISTRATIVE COURT

Neutral Citation Number: [2026] EWHC 191 (Admin)

BEFORE: MRS JUSTICE LANG DBE

BETWEEN:

THE KING

on the application of

(1) OAJ

(2) JAA (a child, by her litigation friend and mother, OAJ)

(3) NAA (a child, by his litigation friend and mother, OAJ)

- and -

(1) HIS MAJESTY'S TREASURY

(2) SECRETARY OF STATE FOR EDUCATION

Claimants

Defendants

MS JULIA SMYTH KC (instructed by Gold Jennings) appeared on behalf of
Claimants.

MS HANNAH SLARKS (instructed by Government Legal Department) appeared on
behalf
of Defendants.

JUDGMENT

(As Approved)

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1. MRS JUSTICE LANG: The claimants, who are a mother and her two youngest children, aged two and one, seek permission to apply for judicial review of the eligibility criteria for statutory schemes for childcare support. The first claimant is ineligible for support because she is a national of Nigeria on a skilled worker visa (she is a nurse) with "no recourse to public funds". 2. On 11 September 2025, Mr C. M. G. Ockleton, sitting as a Judge of the High Court, refused their application for expedition and interim relief. 3. In an application sealed on 22 September 2025, the first claimant applied to set aside the order refusing interim relief and she renewed her application for interim relief. On 22 October 2025, Sarah Clarke KC, sitting as a Deputy Judge of the High Court, adjourned the applications to an oral hearing at the request of the claimants. She granted the first claimant permission to rely on further witness statements and gave case management directions. Factual summary 4. The key facts are that the first claimant, whose date of birth is 20 May 1987, is a qualified nurse specialising in mental health. She was granted leave to enter the UK as a skilled worker from 5 June 2021 to 29 June 2024. She extended her visa in 2024 and it is due to expire on 13 July 2026. She is on a five-year route to settlement, and under the current rules (which may be revised), she will become eligible for settlement in June 2026. 5. The first claimant has a son, whose date of birth is 13 March 2014. He joined her in the UK in 2022. She met her partner, Mr A, in the UK and they had two children together: the second claimant (date of birth, 29 May 2023), and the third claimant (date of birth, 30 September 2024). Following the birth of both children, she took maternity leave and was paid statutory maternity pay.

6. Mr A did not live with the first claimant and their family. In July 2024, he left them and ceased all contact and support. He is an Irish national settled in the UK. Therefore his children, who were born in the UK, are British citizens. However, he refuses to accept that he is the father of the third claimant. Epiq Europe Ltd, Lower Ground, 46 Chancery Lane, London WC2A 1JE www.epiqglobal.com/en-gb/ 7. The first claimant has been sponsored by the same healthcare provider throughout on mental healthcare wards. She works seven 12-hour shifts per fortnight. Her basic salary is £36,636. She earns more if she can do overtime, which is dependent, in part, on the availability of childcare. She also receives limited child maintenance, recovered from her ex-partner by the Child Maintenance Service. Obviously, childcare is essential to enable her to work. She cannot afford registered childcare providers and so she is using an informal childminder (a friend of a friend) who has warned her that she cannot continue the arrangement indefinitely. 8. From time to time, the Claimant's mother has visited from Nigeria to help her with the children, but she does not have leave to remain in the UK. Delay 9. The first claimant was obliged to bring her claim when she was first affected by the eligibility criteria, which corresponds to the date at which she acquired standing (see *R (Badmus) v Secretary of State for the Home Department* [2020] EWCA, Civ 657). A claimant has standing once the facts are such that impugned legislation will apply to their case at a future date (see *R (Delve) v. Secretary of State for the Home Department* (2020) EWCA, Civ 657, at [127], where a challenge to pension legislation was out of time, as the claimants had standing when the legislation was passed, when time began to run, notwithstanding they were not yet 60. 10. In the context of the application for interim relief (not a delay challenge), Mr C. M. G. Ockelton observed in his order that the first claimant's position had been predictable for about a year prior, during which time she had not sought to challenge the regime.
11. The defendants submitted that the first claimant acquired standing when third claimant was conceived (about 9 months prior to her date of birth in September 2024), because she knew she would need childcare when she returned to work and would not be able to afford to pay for childcare for two children. The first claimant submits that she acquired standing when she completed her maternity leave and resumed work on 30 June 2025, as that was when she needed to avail herself of the statutory childcare schemes. I prefer the first claimant's submission. On the Epiq Europe Ltd, Lower Ground, 46 Chancery Lane, London WC2A 1JE www.epiqglobal.com/en-gb/ defendants' submission the date on which time is deemed to run (i.e. conception) is too uncertain to be relied upon and does not take account of the possibility that the first claimant might be seeking childcare from family or friends or paying for it herself, rather than applying under the statutory scheme. Similarly, the date of the third claimant's birth is also too uncertain as a starting point because it does not take account of the first claimant's circumstances at the relevant times.
12. The claim was filed at the Administrative Court Office on 29 August 2025. It was filed within the three-month long stop period, commencing on or about 30 June

2025. There was no lack of promptness because she did not obtain full legal aid until 21 August 2025, through no fault of her own or her legal representative. The statutory provisions
13. The claimants seek to challenge the legality of the eligibility criteria in two statutory schemes. First, the Childcare Payments (Eligibility) Regulations 2015 ("the TFC Eligibility Regulations"), which were made under the Childcare Payments Act 2014, and prescribe eligibility criteria for tax-free childcare top-ups ("TFC"). The scheme provides qualifying parents with up to £500 every quarter for each child to help them meet the costs of childcare. The first defendant is responsible for determining the eligibility criteria for this scheme. The eligibility provision which is challenged is Regulation 7(3)(c). 14. Second, the Childcare (Free of Charge for Working Parents) (England) Regulations 2022 ("the 2022 FCWP Regulations"), which were made under the Childcare Act 2016, and prescribe eligibility criteria for the scheme for extended free childcare for working parents ("extended FCWP"). The scheme provides for up to 30 hours a week of free childcare (increased from 15 hours in September 2025) to parents of children who are nine months plus. The second defendant is responsible for determining the eligibility criteria for this scheme. The eligibility criteria are within Regulation 11(1)(a)(iii), read with Regulation 19(2)(b).
 15. As the first claimant's ex-partner was not living with the family, he would not have been eligible to claim under the statutory schemes either. Epiq Europe Ltd, Lower Ground, 46 Chancery Lane, London WC2A 1JE www.epiqglobal.com/en-gb/ Grounds of challenge 16. In summary, the claimants' case is that the eligibility provisions in the statutory schemes are unlawful on the following grounds:
 1. They are ultra vires and inconsistent with the statutory objects and purpose of the enabling primary legislation.
 2. They involve discrimination under article 14 of the European Convention on Human Rights, ("ECHR") read with article 8 of ECHR.
 3. They are irrational.
 4. The defendants have failed to comply with the public sector equality duty, ("PSED") in section 149 of the Equality Act 2010. Ground 1 - ultra vires 17. I do not consider that ground 1 is arguable with a realistic prospect of success, for the reasons set out in the summary grounds of defence ("SGD").
 18. The statutory scheme concerning those who are excluded from state support due to their immigration status has broadly three sources: section 115 of the Immigration and Asylum Act 1999; paragraph 6 of the Immigration Rules; and eligibility rules for specific support schemes (both statutory and non-statutory) that are not defined as "public funds". The source of the eligibility criteria is this third category.

19. Those who have a "no recourse to public funds" condition on their visa, or are otherwise subject to immigration control, are often excluded from such support, because the nature of their immigration status means that they are not generally considered to be entitled to non-contributory state support. Contributory benefits are treated differently because they are "earned" by the recipient.
20. These are both schemes providing targeted support for a subset of working parents in circumstances where, across the statute books, Parliament has demonstrated its commitment to a policy of limiting access to non-contributory state benefits to exclude those who are subject to a "no recourse to public funds" condition. The claimants' submission that the exclusion of parents with no recourse to public funds is incompatible with the statutory purpose of the Child Care Payments Act 2014 and *Epiq Europe Ltd, Lower Ground, 46 Chancery Lane, London WC2A 1JE* www.epiqglobal.com/en-gb/ the Child Care Act 2016 is, in reality, a policy/political argument dressed up as a point of law. The TFC Scheme 21. Section 8.1 of the Child Care Payments Act 2014 requires that, to be eligible, a person must be in the UK. 22. Section 8.2(a) provides a broad power for regulations to "specify circumstances in which a person is to be treated as being or not being in the United Kingdom". This expressly envisages that some people who are in the United Kingdom may be deemed by the regulations to be outside it. 23. Pursuant to Regulation 7(3)(c), a person subject to immigration control is treated as not being in the UK. A "person subject to immigration control" has the meaning in section 115(9) of the Immigration and Asylum Act 1999 (Regulation 7(4)).
24. This statutory device is common in primary legislation. For similar examples, see section 1(2)(a), 1(5)(a) of the State Pension Credit Act 2002; Regulation 2 of the State Pension Credit Regulations 2002; section 4(1)(c) and 4(5) of the Welfare Reform Act 2012, with Regulation 9 of the Universal Credit Regulations. 25. In adopting similar wording, Parliament was plainly approving the types of criterion contained in Regulation 7(3) which were expressly improved using affirmative procedure. Extended FCWP Scheme
26. This scheme postdated the TFC scheme. Extended FCWP is part of the wider system of free statutory childcare. Universal Free Early Educational Entitlement ("FEEE") is a universal entitlement providing 15 hours of early education per week to all three-to-four-year olds. FEEE for disadvantaged two-year-olds provides 15 hours of free education a week to two-year olds suffering various kinds of disadvantage. This includes all children of parents with "no recourse to public funds" condition subject to income limits. The first claimant earns more than the income limit and does not challenge the income limits as unlawful. Extended FCWP *Epiq Europe Ltd, Lower Ground, 46 Chancery Lane, London WC2A 1JE* www.epiqglobal.com/en-gb/ provides 30 hours a week of free childcare to children above the age of nine months of working parents who meet defined eligibility criteria.
27. By section 1(1) of the Childcare Act 2016, the Secretary of State must secure free childcare for "qualifying children of working parents". The Childcare Act 2016 gives the Secretary of State broad powers to decide how to target this childcare support by defining restrictions in

regulations. Section 1(2)(d) of the Childcare Act 2016 empowers the Secretary of State to place conditions on the parent, enabling the application of extended FCWP to be made. Section 1(4)(d)(ii) of the Childcare Act 2016 empowers the Secretary of State to place conditions to be met by the person making the declaration. 28. In order to make the systems administratively efficient to manage, the initial Childcare Regulations - the 2016 FCWP Regulations - sought to introduce eligibility requirements for FCWP that corresponded as closely as reasonably possible to the requirements for TFC. This would enable the eligibility system to be administered as one process by HMRC.

29. This was explained to Parliament in the explanatory memorandum laid before both Houses alongside the 2016 FCWP Regulations. Parliament then approved the FCWP eligibility criterion accordingly. The history of the drafting of the eligibility criterion in the 2016 FCWP Regulations and then the 2022 FCWP Regulations is involved and I do not need to go into it here. It is explained at SGD/ [31] - [32]. 30. In summary, Regulation 19(2) of the 2022 FCWP regulations states: "(2) a person who makes a declaration in respect of a young child must be the parent or the partner of the parent with whom a child normally lives and a person in the United Kingdom".
31. Regulation 11(1) of the 2022 FCWP Regulations defines a "person in the United Kingdom" as "not a person subject to immigration control" by reference to "section 115(9) of the Immigration and Asylum Act 1999". 32. For a brief period between December 2022 and January 2024, due to an error in consolidation of the Regulations, Regulation 11(1)(a) did not include this provision, Epiq Europe Ltd, Lower Ground, 46 Chancery Lane, London WC2A 1JE www.epiqglobal.com/en-gb/ and Parliament passed a further statutory instrument to reinstate this restriction, which had originally been introduced in 2016: see Regulation 2(3) of the Child Care (Free of Charge for Working Parents) (England) (Amendment and Transitional Provision) Regulations 2023/1330.
33. The claimants' submission that these Regulations are ultra vires because the Child Care Act 2016, unlike the Child Care Payments Act 2014, does not contain a condition that the parent be in the UK is, in my view, unarguable. 34. Section 1(2)(d) empowers the Secretary of State to place conditions on the parent who makes the declaration. The eligibility criterion plainly is such a condition.
35. The claimants' further submissions at paragraphs 84 to 91 of the Statement of Facts and Grounds ("SFG") are successfully rebutted by the defendants at SGD/[34] - [40] Ground 2 - discrimination
36. The claimants submit that their exclusion from eligibility discriminates against them under article 14 ECHR, read with article 8, on the grounds of race, sex and other status. It is submitted that the first claimant is being treated differently from persons in analogous situations, and being treated similarly to people whose situation is different.

37. The defendants accept that articles 8 and 14 of the ECHR are engaged. They also accept that the eligibility criteria discriminate on the basis of immigration status. The issue in dispute is whether any discrimination was objectively justified. I accept the defendants' submission that it was.
38. As stated in *R (T) v Secretary of State for Education* [2018] EWHC 2582 (Admin) at [34], per Lewis J, the aim of extended FCWP is to provide "additional free childcare to certain groups to facilitate the policy aim" and "the policy giving rise to that differential treatment. Involve choices on the best means of allocating limited resources to achieve social policy goals (here facilitating and incentivising work)". The same analysis applies to TFC. *Epiq Europe Ltd, Lower Ground, 46 Chancery Lane, London WC2A 1JE* www.epiqglobal.com/en-gb/ 39. In matters relating to the justification of differential treatment, arising out of general economic or social measures, the courts show a wide margin of appreciation to the choices made by states: see, for example, *R (SC) v Work and Pensions Secretary* [2022] AC 223.
40. Courts should exercise considerable caution before interfering with a scheme that has been approved by Parliament. It has been established at the highest level that a state may be "justified in distinguishing between different categories of aliens resident on its territory and in limiting the access of certain categories of aliens to 'resource-hungry public services' (*BAH v United Kingdom* [2012] HLR 2 at [49]). In my view, the same principle applies here.
41. Lord Carnwath held in *R (HC) v Department of Work and Pensions* [2017], 3 WLR 1486 at [32], when finding that Zanbrano rights did not include a right to access mainstream welfare benefits: "The Government's reasons for not providing support ... included the objectives of reducing costs by allocating benefits to those with the greatest connection with this country, of encouraging immigrants here unlawfully to regularise their stay, of encouraging third-country nationals wishing to have children here to ensure they had sufficient resources to support themselves and their children, and of reducing 'benefit tourism' ... I find it impossible to say that these objectives fall outside the wide margin of discretion allowed to national governments in this field".
42. To the extent that it is said that women and people from certain racial groups are disproportionately impacted, that was an inevitable result of any policy that limits support for parents on the basis of their immigration status (see *R (SC) v Work and Pensions Secretary* at [195]). There is no other way that the eligibility criteria's legitimate aims could be achieved. 43. For these reasons, I consider that ground 2 is unarguable and has no realistic prospect of success. Ground 3 - rationality *Epiq Europe Ltd, Lower Ground, 46 Chancery Lane, London WC2A 1JE* www.epiqglobal.com/en-gb/
44. Under ground 3, the claimants submit that the schemes are irrational and the defendants have failed to take relevant matters into consideration.

45. The claimants rely on their submissions under grounds 1 and 2. I refer to my conclusions on those grounds, in particular, on the issue of objective justification.
46. Contrary to the claimant's submissions, it is undoubtedly rational to exclude from these forms of support both those who are in the UK illegally, and those who agreed to come here on the basis that they would not access this support. In each case, there is a different, but obviously reasonable, basis for denying support.
47. Contrary to the claimants' submissions at SFG/121, the first claimant is in a considerably better position than migrants who are not allowed to work or cannot find work. She is a skilled worker with a salary of over £36,000.
48. The claimants submit that exclusion from the statutory schemes disadvantages parents and children. Of course, I accept that it would be beneficial for the claimants to have subsidised childcare, but the benefit to them has to be weighed against other wider considerations in the public interest. The visa condition of "no recourse to public funds" was the basis upon which the first claimant and others in her position chose to come to the UK and to benefit from the work opportunities here on a short- term basis. The UK also benefits from their skilled work. This cohort of skilled migrants has many options available to them. It is obvious that childcare support may be more readily available from friends and family in a migrant's home country than in a foreign country. For that reason, some skilled workers may choose not to come to the UK, if they have children or are about to start a family, or they may choose to return home when they have children. Alternatively, if, like the first claimant, they wish to settle here on the five-year path, they may decide to wait and apply for settlement, whereupon the "no recourse to public funds" condition will no longer apply. In the first claimant's case, that date may be in a matter of months. 49. For all these reasons and the matters raised under ground 2, I do not consider that the claimants have, arguably, reached the high threshold for a successful rationality challenge. Ground 4 - PSED Epiq Europe Ltd, Lower Ground, 46 Chancery Lane, London WC2A 1JE www.epiqglobal.com/en-gb/
50. The claimants submit that the defendants failed to discharge the PSED in section 149 of the Equality Act 2010 when making the Regulations. They consider that the material that was produced by the defendants was insufficient to discharge the duty. 51. I consider, first, the material produced in regard to the extended FCWP scheme. The defendants listed it at SGD/ [55] to [56]: "55. Careful regard was had to the impact of the eligibility criteria on excluded groups.
56. In particular, equalities impacts of the extended FCWP eligibility criterion were considered at every stage and have been considered more deeply over time:

- (a) In a Ministerial Submission of 22 February 2016, the Minister was asked to consider whether extended FCWP should be available to non-EEA nationals with permission to work but subject to an NRPF condition. On 10 February 2016, the Minister's feedback was that he considered that extended FCWP should align with TFC eligibility. The Secretary of State then confirmed this on 1 March 2016.
- (b) A further submission of 21 September 2016 set out the position on families with NRPF. It said: 'Our policy position is that it is right that those with no recourse to public funds who cannot access other public services should not be able to access this form of government support. In addition, it is simpler for parents to understand the eligibility criteria where 30 hours and tax-free childcare are aligned'.
- (c) An equality impact assessment dated September then acknowledged the position of this group. It stated: 'Parents who are ... subject to immigration control (i.e. have no recourse to public funds) are not eligible for 30 hours free childcare, even if they are in qualifying paid work. This is a specific element of the eligibility criteria where we have aligned with tax-free childcare to facilitate joint eligibility checking. These parents are still eligible for the universal entitlement to 15 hours per week (570 hours per year) of free early education. Our policy position is that those with no recourse to public funds who cannot access other public services should not be able to access this form of Government support. We are not aware of any evidence that Epiq Europe Ltd, Lower Ground, 46 Chancery Lane, London WC2A 1JE www.epiqglobal.com/en-gb/ introducing the extended entitlement would impact upon children or adults (employees or business owners) of a particular race or ethnicity disproportionately'.
- (d) In a submission of 20 November 2023, Ministers were asked to consider the correction that needed to be made to the 2022 FCWP Regulations to reinstate the FCWP eligibility criterion. A further EQA was produced which acknowledged the impact on particular racial groups: 'The working parent entitlement is available to all parents, irrespective of race, provided they are "a person within the United Kingdom" within the meaning of the Regulations. This excludes persons subject to immigration control from the working parent entitlements. Whilst this is likely to particularly affect parents from certain racial groups, this is considered justified by the need to focus resources on those lawfully in the UK on a long-term basis. It aligns with the rules on entitlement to tax-free childcare to facilitate joint eligibility checking. These parents are still eligible for the universal entitlement to 15 hours per week (570 hours per year) of free early education, and may be eligible for the entitlement for the most disadvantaged two-year-olds in some circumstances'.
- (e) The claimants object to this analysis because they say that the first claimant intends to stay in the UK beyond five years, at which point she will accrue settled status. Therefore, they say that she is here on a 'long-term basis'. This is not an argument to the effect that the PSED has not been considered. It is a disagreement with the conclusions of the PSED analysis, which can only be challenged by rationality review. The analysis is rational: 'the five-year route to settlement' operates by allowing skilled workers to transition to settled status on the basis of

how long they have, in fact, been in the UK rather than how long they say they plan to be here. During the first five years, the first claimant will be an NRPF. After five years, if she accrues settled status, she will be seen as here on a long-term basis, and then she will have recourse to public funds".

52. On 7 January 2026, Minister Bailey in the Department of Education approved an updated equality impact assessment, specifically focussing on the impact of the exclusion of adults and children from the extended FCWP scheme. It concluded: "Overall impacts and Justifications/Mitigations (footnotes omitted) Overall, the exclusion of NRPF parents from the Working Parent Entitlement may have a disproportionate negative impact upon parents with certain characteristics, particularly women and those who do not have British nationality and are from certain ethnic groups. We do not consider this has an Epiq Europe Ltd, Lower Ground, 46 Chancery Lane, London WC2A 1JE www.epiqglobal.com/en-gb/ impact on the need to eliminate discrimination, because we consider that this difference in treatment is justified, based on the objective of the NRPF exclusion. If a difference in treatment is a proportionate means of achieving legitimate aims (as explored further below), it will not amount to discrimination. We also do not consider that NRPF exclusion will have a negative impact on other conduct prohibited by the Act, or the need to foster good relations. It may have a negative impact on the need to advance equality of opportunity between people who share these particular protected characteristics and people who do not share them. The direct effect on a family of being ineligible for the Working Parent Entitlement is that if they choose to use formal childcare, then they have to pay the full cost of their childcare and so will have less disposable income after childcare costs. The consequences of this will be different for different families, but might include lower consumption of formal childcare, lower labour market participation, and/or greater use of lower quality or informal childcare. We also considered the impacts on children. The Working Parent Entitlement is available to children aged from 9 months to compulsory school age. However, children who are excluded due to the NRPF status of their parent may still be able to access 15 hours of free early education from age 2 through the disadvantaged 2-year-old entitlement and will be eligible for 15 hours of early education for all 3-and-4-year-olds. Although there are developmental benefits for some children in accessing 20 hours of formal early education from age 2 (and potentially even earlier), children with NRPF parents may still be able to access this by buying formal childcare. However, not all NRPF parents will be able to afford this and children in these families may be in the disadvantaged group most likely to benefit from formal childcare from an earlier age. It should also be noted that other children are also excluded from the Working Parent Entitlement due to parental status, for example if their parent is a volunteer or unable to work, or only one parent works in a two-parent household. The Working Parent Entitlement policy is not aimed primarily at developmental benefit for children, but at supporting eligible parents to work, or to work more hours. Although some parents with NRPF are working, their ineligibility for the Working Parent Entitlement reflects the general government approach that these persons should not usually be permitted to access most kinds of publicly funded support and

reaching a contrary decision would contradict the government's approach and create inconsistent policies. The exclusion of this group is considered justified by the need to focus resources on those lawfully in the UK on a long-term, permanent basis. It aligns with the rules on TFC to facilitate joint eligibility checking. Further, in the case of those who came to the UK on visas which required them to agree not to have recourse to public funds, it further reflects a fair approach to the choice that they have made when accepting their visa. Epiq Europe Ltd, Lower Ground, 46 Chancery Lane, London WC2A 1JE www.epiqglobal.com/en-gb/ There is no way to mitigate the effects of the policy for this group, except by extending eligibility to some or all of them, which we do not think is appropriate for the reasons given above. It should be noted that there are already provisions within the NRPF policy framework for people to apply for a "Change of Conditions" to have their NRPF condition lifted. In particular, people with permission under the Family or Private Life routes or the Hong Kong British National (Overseas) route can apply to have their NRPF condition lifted if they can show that: they are destitute or at risk of imminent destitution; there are reasons relating to the welfare of a relevant child which outweigh the which outweigh the considerations for imposing or maintaining the condition; or they are facing exceptional circumstances affecting their income or expenditure. For those on other routes, the Secretary of State for the Home Office has discretion to vary conditions on any leave to remain granted. And so (although the general expectation would be that someone, e.g., on a skilled worker visa would return to their home country if they cannot support themselves and their family), in rare circumstances this discretion can be applied to lift an NRPF condition for someone on a different visa route if there is a particularly compelling case for access to public funds. Overall, our overall assessment is that despite the potential negative impacts on parents with NRPF and their children, the policy of excluding them from eligibility for the Working Parent Entitlement should be maintained."

53. Turning now to the TFC scheme, the defendants give this explanation of the history at SGD/ [57] to [58]: "57. While EQAs were prepared regarding TFC in 2014 and 2017, they did not address the eligibility criteria. There has been some internal consideration of the issues since but not at a Ministerial level.
58. In order to ensure that the relevant Ministers have adequately considered the PSED, a detailed EQA was submitted to the relevant Ministers. This dealt with all these issues in considerable detail. The eligibility policy has not changed in any material ways since its commencement beginning in 2017. The relevant Treasury Minister has personally considered the EQA on or about 11 September 2025 and formed the view that the eligibility criteria were, nonetheless, justified. It is clear for the reasons given in the EQA the same policy approach would have been taken if the EQA had been produced earlier."
54. The second defendant's equalities impact assessment is a detailed analysis of the impact of the exclusion of parents with no recourse to public funds from TFC. It concluded, among other matters: Epiq Europe Ltd, Lower Ground, 46 Chancery Lane, London WC2A 1JE www.epiqglobal.com/en-gb/

- a. The policy is proportionately less likely to benefit those from black or Asian or other non-British backgrounds than those from white ethnic backgrounds.
 - b. They expected that the policy would impact more negatively on women than on men with no recourse to public funds.
 - c. The policy is likely to affect children, especially disabled children.
55. However, the assessment concluded that the negative impacts were a proportionate and justified effect of achieving aims of the TFC scheme and the "no recourse to public funds" condition.
56. The assessment noted changes since 2014, notably Brexit and changes in patterns of migration. However, the authors did not think that these factors would have changed their qualitative assessment in terms of where there might be disproportionate impacts and why.
57. Section 149 of the Equality Act 2010 provides: "Public sector equality duty
- (1) A public authority must, in the exercise of its functions, have due regard to the need to –
 - (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;
 - (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
 - (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it."
58. I refer to the authoritative summary of the PSED principles in *R(Bracking) v Secretary of State for War and Pensions* [2013] EWCA Civ 1345, [2014] Eq LR 60, per McCombe LJ, at [26]:
- "(1) As stated by Arden LJ in *R (Elias) v Secretary of State for Defence* [2006] 1 WLR 3213; [2006] EWCA Civ 1293 at [274], equality duties are an integral and important part of the mechanisms for ensuring the fulfilment of the aims of anti-discrimination legislation.
- (2) An important evidential element in the demonstration of the discharge of the duty is the recording of the steps taken by the decision maker. *Epiq Europe Ltd*, Lower Ground, 46 Chancery Lane, London WC2A 1JE www.epiqglobal.com/en-gb/maker in seeking to meet the statutory requirements: *R (BAPIO Action Ltd) v Secretary of State for the Home Department* [2007] EWHC 199 (QB) (Stanley Burnton J (as he then was)).
 - (3) The relevant duty is upon the Minister or other decision maker personally. What matters is what he or she took into account and what he or she knew. Thus, the Minister or decision maker cannot be taken to know what his or her officials know or what may have been in the minds of officials in proffering their advice: *R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154 at [26 – 27] per Sedley LJ.

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- (4) A Minister must assess the risk and extent of any adverse impact and the ways in which such risk may be eliminated before the adoption of a proposed policy and not merely as a “rearguard action”, following a concluded decision: per Moses LJ, sitting as a Judge of the Administrative Court, in *Kaur & Shah v LB Ealing* [2008] EWHC 2062 (Admin) at [23 – 24].
- (5) These and other points were reviewed by Aikens LJ, giving the judgment of the Divisional Court, in *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), as follows:
- i) The public authority decision maker must be aware of the duty to have “due regard” to the relevant matters; ii) The duty must be fulfilled before and at the time when a particular policy is being considered; iii) The duty must be “exercised in substance, with rigour, and with an open mind”. It is not a question of “ticking boxes”; while there is no duty to make express reference to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument; iv) The duty is non-delegable; and
 - v) Is a continuing one. vi) It is good practice for a decision maker to keep records demonstrating consideration of the duty.
- (6) “[G]eneral regard to issues of equality is not the same as having specific regard, by way of conscious approach to the statutory criteria.” (per Davis J (as he then was) in *R (Meany) v Harlow DC* [2009] EWHC 559 (Admin) at [84], approved in this court in *R (Bailey) v Brent LBC* [2011] EWCA Civ 1586 at [74–75].)
- (7) Officials reporting to or advising Ministers/other public authority decision makers, on matters material to the discharge of the duty, must not merely tell the Minister/decision maker what he/she wants to hear but they have to be “rigorous in both enquiring and reporting to them”: *Epiq Europe Ltd, Lower Ground, 46 Chancery Lane, London WC2A 1JE* www.epiqglobal.com/en-gb/ *R (Domb) v Hammersmith & Fulham LBC* [2009] EWCA Civ 941 at
- [79] per Sedley LJ.
- (8) Finally, and with respect, it is I think, helpful to recall passages from the judgment of my Lord, Elias LJ, in *R (Hurley & Moore) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin) (Divisional Court) as follows:
- (i) At paragraphs [77–78] “[77] Contrary to a submission advanced by Ms Mountfield, I do not accept that this means that it is for the court to determine whether appropriate weight has been given to the duty. Provided the court is satisfied that there has been a rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, then as Dyson LJ in *Baker* (para [34]) made clear, it is for the decision maker to decide how much weight should be given to the various factors informing the decision.
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- [78] The concept of 'due regard' requires the court to ensure that there has been a proper and conscientious focus on the statutory criteria, but if that is done, the court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision maker. In short, the decision maker must be clear precisely what the equality implications are when he puts them in the balance, and he must recognise the desirability of achieving them, but ultimately it is for him to decide what weight they should be given in the light of all relevant factors. If Ms Mountfield's submissions on this point were correct, it would allow unelected judges to review on substantive merits grounds almost all aspects of public decision making." (ii) At paragraphs [89–90] "[89] It is also alleged that the PSED in this case involves a duty of inquiry. The submission is that the combination of the principles in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 and the duty of due regard under the statute requires public authorities to be properly informed before taking a decision. If the relevant material is not available, there will be a duty to acquire it and this will *Epiq Europe Ltd, Lower Ground, 46 Chancery Lane, London WC2A 1JE* www.epiqglobal.com/en-gb/ frequently mean that some further consultation with appropriate groups is required. Ms Mountfield referred to the following passage from the judgment of Aikens LJ in *Brown* (para [85]): '...the public authority concerned will, in our view, have to have due regard to the need to take steps to gather relevant information in order that it can properly take steps to take into account disabled persons' disabilities in the context of the particular function under consideration.'
- [90] I respectfully agree...."
59. This passage in *Bracking* was approved by Lord Neuberger in *Hotak v Southwark LBC and R (Bridges) v Chief Constable of South Wales Police* [2015] UKSC 30,
- [2016] AC 811, at [73], who added, at [75]: "75. As was made clear in a passage quoted in *Bracking*, the duty "must be exercised in substance, with rigour, and with an open mind" (per Aikens LJ in *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin), [2009] PTSR 1506, para 92. And, as Elias LJ said in *Hurley and Moore*, it is for the decision-maker to determine how much weight to give to the duty: the court simply has to be satisfied that "there has been rigorous consideration of the duty". Provided that there has been "a proper and conscientious focus on the statutory criteria", he said that "the court cannot interfere ... simply because it would have given greater weight to the equality implications of the decision".
60. These passages were cited with approval by the Court of Appeal in *R (Bridges) v Chief Constable of South Wales Police* [2020] EWCA Civ 1058; [2021] 1 Cr. App. R 4 at [174]-[175]. The Court of Appeal added, at [176]: "We accept (as is common ground) that the PSED is a duty of process and not outcome. That does not, however, diminish its importance...."

61. Applying these principles to this case, I am satisfied that the Secretary of State for Education has adequately discharged the PSED in relation to the extended FCWP, both initially in 2016 and subsequently in 2023, which was before the date when the first claimant would have applied to the scheme if she had been eligible. I accept that the equality implications of the eligibility criteria have been considered in different ways over the years. What is clear is that there were competing views, and the Epiq Europe Ltd, Lower Ground, 46 Chancery Lane, London WC2A 1JE [www.epiqglobal.com/en-gb/advantages and disadvantages of the exclusion and its impact were properly considered](http://www.epiqglobal.com/en-gb/advantages-and-disadvantages-of-the-exclusion-and-its-impact-were-properly-considered).
62. However, the position is different in relation to the TFC scheme. Although there were equality impact assessments in 2015 and 2017, they did not address the eligibility criteria and, although the criteria have been considered, this was not at ministerial level. Therefore, I conclude that the first defendant did not discharge the PSED adequately in respect of the TFC. 63. In respect of both schemes, the defendants submit that permission should be refused under section 31(3)(D) of the Senior Courts Act 1981, because the detailed assessments carried out in September 2025 and in January 2026 have considered the relevant issues in relation to the eligibility criteria and, at a ministerial level, it has been concluded that equalities impacts and disadvantages were justified and could not be mitigated. 64. Subsections 31(3)(C) to (3)(E) of the Senior Courts Act 1981 provide: “(3)(C) When considering whether to grant leave to make an application for judicial review, the High Court – (a) may of its own motion consider whether the outcome for the applicant would have been substantially different if the conduct complained of had not occurred, and (b) must consider that question if the defendant asks it to do so. (3)(D) If, on considering that question, it appears to the High Court to be highly likely that the outcome for the applicant would not have been substantially different, the court must refuse to grant leave. (3)(E) The court may disregard the requirement in subsection (3D) if it considers that it is appropriate to do so for reasons of exceptional public interest.” 65. In *R (Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214, at [273], the Court of Appeal considered the scope of section 31(2A) of the Senior Courts Act 1981 (which makes similar provision in respect of the grant of relief) and gave the following guidance: *Epiq Europe Ltd, Lower Ground, 46 Chancery Lane, London WC2A 1JE* www.epiqglobal.com/en-gb/ “273. It would not be appropriate to give any exhaustive guidance on how these provisions should be applied. Much will depend on the particular facts of the case before the court. Nevertheless, it seems to us that the court should still bear in mind that Parliament has not altered the fundamental relationship between the courts and the executive. In particular, courts should still be cautious about straying, even subconsciously, into the forbidden territory of assessing the merits of a public decision under challenge by way of judicial review. If there has been an error of law, for example in the approach the executive has taken to its decision-making process, it will often be difficult or impossible for a court to conclude that it is “highly likely” that the outcome would not have been “substantially different” if the executive had gone about the decision-making process in accordance with the law. Courts should also not lose sight of their fundamental function, which is to maintain the rule of law.

Furthermore, although there is undoubtedly a difference between the old Simplex test and the new statutory test, “the threshold remains a high one” (see the judgment of Sales L. J., as he then was, in *R. (on the application of Public and Commercial Services Union) v Minister for the Cabinet Office*

[2017] EWHC 1787 (Admin); [2018] 1 All E. R. 142, at paragraph 89).” 66. In *R (Friends of the Earth) v SSEFRA* [2024] EWHC 2707 (Admin), Chamberlain J set out the principles to be applied where the PSED had not been discharged at the time of the decision, but was met subsequently. He said at [134], [135] and [139]: “134. Mr Westmoreland Smith sensibly concentrated in his oral submissions on arguing that I should refuse relief under s. 31(2A) or (3C) of the SCA 1981. Even before that provision came into force, there were dicta indicating that the court should be slow to quash decisions in circumstances where the duty had been substantively complied with after the event: see e.g. *R (Hurley) v Secretary of State for Business, Innovation and Skills* [2012] EWHC 201 (Admin), [2012] HRLR 13, at [98]-[99] and [102] (Elias LJ and King J). In *R (West Berkshire District Council) v Secretary of State for Communities and Local Government* [2016] EWCA Civ 441, [2016] 1 WLR 3923, [87] Laws and Treacy LJJ, with whom Lord Dyson MR agreed, said this at [87]: “...we have strong reservations about the proposition that the court should necessarily exercise its discretion to quash a decision as a form of disciplinary measure. During the course of argument, [counsel for the claimant] accepted that if an assessment, subsequently carried out, satisfied the court, there would be no point in quashing the decision if the effect of doing that and requiring a fresh consideration would not have led to a different decision. We think this was a correct concession. The court’s approach should not ordinarily be that of a disciplinarian, punishing for the sake of it, in these circumstances. The focus should be on the adequacy and good faith of the later assessment, *Epiq Europe Ltd*, Lower Ground, 46 Chancery Lane, London WC2A 1JE www.epiqglobal.com/en-gb/ although the court is entitled to look at the overall circumstances in which that assessment was carried out.”

135. That can be taken as an authoritative statement of the principles governing the exercise of the court’s remedial discretion in this area. However, since the coming into force of s. 31(2A), (2B), (3C) and (3D) of the SCA 1981, the position is no longer one of discretion. As Coulson LJ pointed out in *Gathercole* at [38], those provisions impose a duty, which the court cannot shirk. ...
139. In those circumstances, if I were to quash EQIA1 and remit the matter to the Secretary of State, I would be requiring a re-run of a process which has already been undertaken. The outcome of the decision following consideration of EQIA2 shows that the result is highly likely to be the same. There would be no point in doing that. ...” 67. In my judgment, subsection 31(3)(D) applies to the criticism of the TFC assessment. The recent assessment in September 2025 is an in-depth consideration of the impacts of the eligibility criteria and the first defendant finds the adverse inequalities to be justified. I do not consider that the claimants’ criticisms of the 2025 assessment establishes that it does not adequately discharge

the PSED duty. In the light of this recent assessment, it is highly likely that the outcome for the claimants would not have been substantially different if the conduct complained of had not occurred. In those circumstances, I am required to refuse permission unless I find there are reasons of exceptional public interest to disregard that requirement. I do not find any such reasons here. 68. If I am wrong in my conclusion that there is no breach of the PSED in respect of the extended FCWP, then I consider subsection 31(3)(D) of the Senior Courts Act 1981 applies there in the same way as it applies to the TFC. There has recently been an in-depth consideration of the impacts of the eligibility criteria, which the Secretary of State finds to be justified. It is therefore, highly likely that the outcome for the claimants would not have been substantially different if the conduct complained of had not occurred. 69. I do not accept the claimants' submission that section 31(3)(D) should not be applied where only a declaration is sought. This would defeat the object of section 31(3)(D). Permission would have to be granted for a substantive hearing on the PSED ground Epiq Europe Ltd, Lower Ground, 46 Chancery Lane, London WC2A 1JE www.epiqglobal.com/en-gb/ which has become academic. The purpose of section 31(3)(D) is to spare defendants from this burden.

70. Therefore permission is refused on ground 4. Final conclusions 71. For the reasons set out above, permission to apply for judicial review is refused on all grounds. As the claimants have failed to establish an arguable claim, there is no basis upon which interim relief can be granted.

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